SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

CONNECTICUT INTERLOCAL RISK MANAGEMENT AGENCY *v.* CHRISTOPHER JACKSON et al., SC 19946

Judicial District of Tolland

Negligence; Causation; Whether Connecticut Should Adopt "Alternative Liability" Theory of Negligence Where There is Uncertainty as to Which Defendant Caused the Plaintiff's Harm. On the morning of June 2, 2012, a fire broke out in an abandoned mill in Somers. The fire destroyed the mill and a sewer line owned by the town of Somers. The plaintiff is the town's insurer, and it paid for the repair of the sewer line. The plaintiff then brought this subrogation action, seeking to recover the cost of repairing the sewer line from defendants Christopher Jackson, Erin Houle and Wesley Hall. The defendants were in the mill smoking cigarettes in the hours leading up to the fire, and the plaintiff alleged that their negligence in carelessly disposing of the fifteen or so cigarettes that they smoked caused the fire. The defendants moved that summary judgment enter in their favor, arguing that the plaintiff could not prove causation because it could not prove which of the defendants had negligently disposed of his or her cigarette in the area where the fire started. While the plaintiff conceded that, under current Connecticut negligence law, the defendants were entitled to prevail, it urged the trial court to adopt the "alternative liability" theory of negligence. While no Connecticut court has yet to recognize the alternative liability theory, the theory is codified in the Restatement (Second) of Torts § 433B (3), which provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." The trial court declined to adopt the theory and rendered summary judgment for the defendants, concluding that, while some other states had adopted the theory, the question of whether Connecticut should adopt the theory was best left to the legislature or to this state's appellate courts. The plaintiff appeals from the judgment for the defendants and urges that the Connecticut Supreme Court adopt the "alternative liability" theory of negligence expressed in the Restatement (Second) of Torts § 433B (3).

MARINELIS SENA, ADMINISTRATRIX OF THE ESTATE OF TYRONE TILLMAN, et al. *v.* AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC., et al.,
SC 19971
Judicial District of Fairfield

Negligence; Municipal Immunity; Whether Defendant City Immune From Liability for Negligence in Connection With Its Conduct Following Declaration of Civil Preparedness Emergency. On February 8, 2013, Governor Dannel Malloy, pursuant to General Statutes § 28-9 (a), declared a civil preparedness emergency in anticipation of an expected snowstorm. The snowstorm ended around noon the next day. On the evening of February 11, 2013, the plaintiff's decedent, Tyrone Tillman, a resident of the city of Bridgeport, contacted 911 complaining of severe breathing difficulty. An ambulance arrived several minutes later and Tillman was transported to the hospital, where he was pronounced dead upon arrival. The plaintiff brought this action against the city, alleging (1) that the city failed to follow its "Local Emergency Service Plan" with respect to the appropriate dispatch protocol, and (2) that the ambulance was delayed as a result of the city's negligent failure to clear the streets of accumulated snow. The city moved for summary judgment, claiming that, because the alleged negligent conduct took place while the civil preparedness emergency was still in effect, the city was immune from liability pursuant to General Statutes § 28-13 (a). That statute provides that "[n]either the state nor any political subdivision of the state nor . . . the agents or representatives of the state or any political subdivision thereof . . . shall be liable for the death of or injury to persons . . . as a result of any [emergency preparedness] activity." The city asserted that the civil preparedness emergency remainend in effect until March 18, 2013, when Governor Malloy issued an executive order pursuant to § 28-9 (b) formally ending the emergency. The trial court observed that the same executive order that ended the emergency declared for the February 8, 2013 snowstorm also ended the emergency declared on October 27, 2017 in anticipation of a hurricane. The trial court noted that, under the city's interpretation of § 28-13, the immunity afforded by that statute for civil preparedness emergency declared for the hurricane would have lasted approximately six months. Concluding that the legislature could not have intended such a result, the court rejected the city's claim that its § 28-13 (a) immunity necessarily continued until the Governor formally rescinded the state of emergency. The court denied the city's motion for motion for summary judgment, ruling that a genuine issue of material fact existed as to whether the city

was still experiencing a civil preparedness emergency for purposes of § 28-13 (a) at the time of Tillman's death. The city appeals, claiming that the trial court misinterpreted § 28-13 by concluding that the immunity afforded by that statute applies only if the injury occurs during a civil preparedness emergency. It asserts that, under § 28-13, a municipality is entitled to immunity as long as the injury is causally linked to some type of emergency preparedness activity. Alternatively, the city claims that the court wrongly concluded that the civil preparedness emergency triggered by the impending storm did not necessarily continue until the Governor formally rescinded the state of emergency.

RASPBERRY JUNCTION HOLDING, LLC *v.* SOUTHEASTERN CONNECTICUT WATER AUTHORITY, SC 19974

Judicial District of New London

Municipal Corporations; Negligence; Whether Water Authority's Rule Limiting its Liability for Damages Caused by Loss of Water Service Enforceable. The defendant water authority is a public municipal corporation created in 1967 by a special act of the General Assembly for the public purpose of providing water service. The special act gives the defendant the power to sue and be sued and to "make bylaws for the management and regulation of its affairs . . . and . . . rules for the sale of water . . . ." The defendant promulgated a rule that provides that it "shall not be liable for a deficiency or failure in the supply of water or the pressure thereof for any cause whatsoever, or for any damage caused thereby . . . ." The plaintiff operates the Bellissimo Grande Hotel in North Stonington, and it brought this action alleging that, in 2015, the defendant's negligence caused a water outage that resulted in the plaintiff suffering damages in the form of lost revenue. The trial court granted the defendant's motion for summary judgment, concluding that the defendant's rule absolving it of liability in connection with any failure in the supply of water was enforceable and accordingly that the defendant was not liable for damages caused by the 2015 water service outage. The court found that the defendant is an administrative agency with the power to promulgate regulations that have the force and effect of law, and that its regulations are enforceable unless they are unreasonable or oppressive. Finding no Connecticut authority on point, the court relied on precedent from other jurisdictions in support of its conclusion that a rule promulgated by a water authority that limits its liability for ordinary negligence, such as that alleged by the plaintiff here, is reasonable and enforceable. The plaintiff appeals and argues that the legislature did not give the

defendant the authority to make a rule that immunizes it from liability for claims for damages stemming from its negligence. The plaintiff also argues that the law establishes that, when a municipal corporation such as the defendant is engaged in the proprietary function of selling water to customers for profit, the municipal corporation is liable for damages caused by its negligent performance of that proprietary function.

JOHN P. TUOHY et al. *v.* TOWN OF GROTON et al., SC 20019

Judicial District of Hartford

Taxation; Whether Application of "Adjustment Factor" to Values of all Residential Properties in Groton Long Point Neighborhood Resulted in Manifestly Excessive Assessments. The plaintiffs are owners of residential property in the Groton Long Point neighborhood of Groton, a planned community of approximately six hundred properties. They brought this class action challenging the municipal tax assessment conducted by the town of Groton for the October 1, 2011, grand list. The plaintiffs claimed that the 2011 revaluation resulted in assessments that were illegal and manifestly excessive as contemplated by General Statutes § 12-119. They argued that the town arbitrarily raised the assessed fair market value of every property in the neighborhood by an "adjustment factor" of 1.35, or 35 percent, in an across-the-board increase that was not applied to the other twelve neighborhoods in the town. They maintained that the imposition of the adjustment factor was blindly applied to hundreds of properties without attention to the individual characteristics of those properties and in violation of the statutory mandate to determine the true and actual value of every property. The trial court rendered judgment in favor of the town, finding that the application of the 1.35 adjustment factor to Groton Long Point dwelling values did not violate § 12-119 and that the plaintiffs had not demonstrated that the 2011 revaluation resulted in assessments that were illegal or manifestly excessive. The plaintiffs appeal, claiming that the imposition of a 35% "adjustment factor" to the value of all of the homes in the Groton Long Point neighborhood was illegal and that the uniform inflation of their properties' true and actual value, applied without consideration of the properties' unique characteristics, violates state law. The plaintiffs also argue that actual sales data reveals that Groton Long Point properties suffered a severe decrease in sales prior to the 2011 revaluation period.

GEORGE NORTHRUP et al. v. HENRY WITKOWSKI, JR., et al.,
SC 20023
Judicial District of New Haven

Negligence; Governmental Immunity; Whether Municipality's Maintenance and Repair of Storm Water Drainage System a Ministerial or a Discretionary Duty. The plaintiffs live in Naugatuck, and their residential property was damaged by repeated flooding that resulted when the single catch basin in their area became clogged or proved otherwise inadequate to direct storm water away from their property. The plaintiffs brought this action against the town and town officials and alleged that the defendants were negligent in failing to properly maintain and repair the storm water drainage system. The trial court granted the defendants' motion for summary judgment, finding that the defendants enjoyed governmental immunity from the plaintiffs' negligence claims pursuant to General Statutes § 52-557n (a) (2) (B) because the negligence claims were premised on alleged acts or omissions that required the exercise of judgment or discretion. The plaintiffs appealed, and the Appellate Court (175 Conn. App. 223) affirmed the trial court's judgment. The Appellate Court rejected the plaintiffs' claim that the acts or omissions of which they complained were ministerial rather than discretionary because a town ordinance specified that the defendants were responsible for maintaining and repairing the storm water system. It noted that, while the ordinance required the defendants to maintain and repair the storm water system, it did not dictate the manner in which they were to do so, and that the manner in which the defendants carried out that duty was left very much to their judgment and discretion. The Appellate Court also rejected the plaintiffs' reliance on *Spitzer* v. *Waterbury*, 113 Conn. 84 (1931), another negligence action brought against a municipality arising from a malfunctioning storm water system. In *Spitzer*, the Supreme Court stated that the work of keeping drains and sewers in repair was ministerial. The Appellate Court concluded that *Spitzer* was factually distinguishable and that the language in that decision relied upon by the plaintiffs was dicta. The Appellate Court also noted that, in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262 (2012), it suggested that the duty to maintain roads and drainage systems was discretionary and noted that, since *Spitzer*, the law regarding the relationship between discretionary and ministerial acts for governmental immunity purposes has been refined. The plaintiffs were granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly concluded that the defendants enjoyed governmental immunity from the plaintiffs' negligence claim

because the maintenance and repair of storm water systems is a discretionary duty.

PRESIDENTIAL VILLAGE, LLC v. TONYA PERKINS, SC 20043
Judicial District of New Haven

Summary Process; Federally Subsidized Housing; Whether Federal Pretermination Notice Jurisdictionally Defective Because it Included Nonrent Charges. The defendant leased a federally subsidized apartment in New Haven on a monthly basis from the plaintiff. Federal law requires that a landlord seeking to evict a tenant from federally subsidized housing must provide the tenant with a pretermination notice. The plaintiff sent the defendant a pretermination notice that stated that the defendant had violated her lease by failing to pay rent "in the total rental obligation of $6189.56," and the notice defined "total rental obligation" as "delinquent rent, late fees, utilities, legal fees, and any other eviction proceeding sundry cost[s]." The plaintiff brought this summary process action when the defendant failed to tender payment in accordance with the notice. The defendant filed a motion to dismiss the action, claiming that the pretermination notice was jurisdictionally defective under federal and state law because it materially misstated the amount that she was required to pay in order to cure the breach of the lease. She argued that, under Connecticut summary process law, a monthly tenancy can be terminated for nonpayment of rent only with respect to rent for the current month and the immediately preceding month and that therefore that she could have cured her breach of the lease by paying two months' rent in the total amount of $2804. The trial court agreed with the defendant and granted the motion to dismiss. The plaintiff appealed, and the Appellate Court (176 Conn. App. 493) reversed the trial court's judgment and remanded the matter for further proceedings. The Appellate Court held that the notice complied with federal law and that federal law did not require that the notice also comply with Connecticut law. The Appellate Court determined that the notice complied with federal law in that it stated the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense and that federal law did not require that the notice inform the plaintiff of the amount that she could pay in order to cure the breach of the lease under Connecticut law. The Appellate Court also determined that the inclusion of nonrent amounts such as attorney's fees and late fees in the "total rental obligation" did not render the notice fatally defective. The defendant has been granted certification to appeal from the Appel-

late Court's decision. The Supreme Court will decide whether the Appellate Court properly determined that state law did not apply in determining whether a federal pretermination notice is jurisdictionally defective and, if not, whether state law requires that a pretermination notice list only rent charges that constitute some basis for eviction under Connecticut summary process law.

REDDING LIFE CARE, LLC v. TOWN OF REDDING, SC 20054
Judicial District of New Britain

Whether Connecticut Recognizes Qualified Unretained Expert Privilege Regarding Opinion that Expert Previously Rendered and Documented; Whether Supreme Court has Jurisdiction to Review Appellate Court's Final Determination of a Writ of Error. Plaintiff Redding Life Care, LLC, filed a tax appeal in the trial court to challenge the defendant town's assessment of its property. David R. Salinas, an appraiser, had conducted two appraisals of the plaintiff's property on behalf of banks that were considering lending the plaintiff money, and the town sought to compel Salinas to testify in a deposition regarding his appraisals. Salinas moved for a protective order, noting that he had not been retained by either of the parties to the tax appeal and claiming that Connecticut law prohibited compelling his unretained expert testimony. The trial court denied Salinas' motion for a protective order, and Salinas brought a writ of error to challenge that order. The Appellate Court (174 Conn. App. 193) granted the writ of error and reversed the ruling denying a protective order, holding for the first time that Connecticut law recognizes a qualified unretained expert privilege. The Appellate Court declined to recognize an absolute retained expert privilege, opining that a categorical rule that would permit experts to refuse to testify would be contrary to our liberal discovery rules and that there was no justification for a rule that would wholly exempt experts from testifying about previously formulated opinions. The Appellate Court remanded the matter to the trial court for further proceedings where the trial court should, in determining whether to grant Salinas' motion for a protective order on the ground that his testimony would be privileged, consider (1) whether Salinas reasonably should have expected that, in the normal course of events, he would be called upon to provide opinion testimony in subsequent litigation; and (2) whether there exists a compelling need for his opinion testimony in the underlying case. The town appeals, and the Supreme Court will consider first whether it has jurisdiction to review the Appellate Court's final determination of a writ of error. Salinas

argues that the Supreme Court lacks jurisdiction, emphasizing that General Statutes § 51-197f authorizes Supreme Court review only of the Appellate Court's "final determination of [an] *appeal*." If the Supreme Court determines that it has jurisdiction, it will next decide whether Connecticut recognizes a qualified expert testimonial privilege permitting an unretained expert to withhold testimony regarding an opinion that the expert has previously rendered and documented in a written report and, if so, what the scope of that privilege is.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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